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82-1823

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEST COAST MEDIA, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case involves the Federal Communications Commission's denial of the renewal of license for Station KDIG(FM), San Diego, California, for failure to meet its previously proposed levels of non-entertainment programming. This is the very first time that the Federal Communications Commission has ever denied a broadcaster's renewal of license for such a programming failure alone.

The questions presented are:

1. May the FCC impose its most severe sanction, denial of renewal of license, without explaining why a lesser sanction would not suffice?

2. May the FCC reverse twenty years of consistent precedent in similar cases without explaining its reasoning in doing so?

3. May the FCC, consistent with administrative and constitutional standards of due process, make findings that a licensee made misrepresentations to it without giving the licensee notice and an opportunity to present evidence on those charges?

LIST OF PARTIES

Parties to the proceeding in the Court of Appeals for the District of Columbia Circuit for which review is requested were West Coast Media, Inc.;* the Federal Communications Commission; John B. Musselman; and Jonathan D. Lewis.

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* West Coast Media, Inc. has no parent companies, subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner West Coast Media, Inc. ("WCM") requests that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that Court in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals, which affirmed the action of the Federal Communications Commission ("FCC" or "Commission"), is reported at 695 F.2d 617 (D.C. Cir. 1982) and appears at Appendix A, pp. 1a-12a, to this Petition. The *Initial Decision* of the FCC's Administrative Law Judge ("ALJ") renewing KDIG's license for a short term is reported at 79 FCC 2d 625 (1978) and appears at Appendix B, pp. 13a-45a, to this Petition. The FCC's *Decision* denying the renewal of license of Station KDIG (hereinafter referred to as "*Decision*"), reported at 79 FCC 2d 610 (1980), appears at

Appendix C, pp. 46a-68a, to this Petition. The FCC's *Memorandum Opinion and Order* (hereinafter referred to as "*Reconsideration Decision*") denying reconsideration of its previous *Decision* is reported at 86 FCC 2d 331 (1981) and appears at Appendix D, pp. 69a-79a, to this Petition. Other relevant decisions below are: *Memorandum Opinion and Order and Notice of Apparent Liability*, 61 FCC 2d 577 (1976), which appears at Appendix E, pp. 80a-96a, to this Petition; and *Memorandum Opinion and Order*, FCC 77M-1128, released June 24, 1977, which appears at Appendix F, pp. 97a-100a, to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia sought to be reviewed was filed and entered on December 7, 1982.[1] A timely petition for rehearing of the Court's decision filed by WCM was denied on February 7, 1983.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Appendix I, pp. 104a *et seq.*, to this Petition contains the texts of the following statutes:

(1) Section 309(a) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a) and (e);

(2) Section 5(b) of the Administrative Procedure Act of 1946, 5 U.S.C. § 554(b);

(3) Section 10(e) of the Administrative Procedure Act of 1946, 5 U.S.C. § 706(2);

(4) Sections 203(c), (e) and (f) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-3(c), (e) and (f);

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[1] A copy of the judgment sought to be reviewed appears at Appendix G, pp. 101a-102a, to this Petition.

[2] A copy of the Order denying rehearing appears at Appendix H, p. 103a, to this Petition.

(5) Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b); and

(6) Section 9(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-9(b).

STATEMENT OF THE CASE

Preliminary Statement

This case was precipitated by the FCC's denial of renewal of license for Station KDIG, San Diego, California on the sole ground that the station had failed to meet its prior programming promises. This is the first time the FCC has ever denied a broadcaster's license renewal for a promise-versus-performance shortfall alone. In doing so, the FCC did not explain its departure from all previous precedent in such cases. The Commission also failed to explain why a lesser sanction would not suffice. Finally, despite the absence of an appropriate issue, the FCC's Decision was permeated by findings that the licensee made misrepresentations before the agency. Thus, this case involves two key issues: first, the FCC's explanatory burden when, as here, it imposes a sanction unprecedented in its severity in similar cases; and second, the agency's authority to make pivotal findings about a licensee's character without affording the licensee notice and an opportunity to be heard on that issue.

Background

WCM, incorporated in 1970 by a group of business people with no broadcast experience, acquired Station KDIG in 1971. Almost immediately WCM encountered severe financial problems. *Initial Decision*, ¶¶ 3-10. As part of a salvation plan for the station, on December 23, 1971, WCM amended the station's pending 1971 renewal application to propose a reduction in non-entertainment programming to 1.1% of its broadcast week. The Commission accepted the reduction on July 25, 1972. *Initial*

Decision, ¶¶ 12-13. Operating, however, out of a studio/office fashioned out of two motel rooms and beset by an unending stream of physical, technical, staffing and financial problems, WCM was unable to carry out even this reduced proposal. *Initial Decision*, ¶¶ 15-20, 33.

In 1976, in response to a petition to deny KDIG's 1974 application for renewal of license, the Commission designated that application for hearing on a number of issues, including whether "West Coast Media, Inc. made reasonable and good faith efforts to carry out its non-entertainment programming proposal as set forth in its 1971 application for renewal . . . ." *Memorandum Opinion and Order and Notice of Apparent Liability*, 61 FCC 2d 577, 585 (1976).[3] Despite the urgings of petitioners to deny that WCM had misrepresented to the Commission in a number of areas, the FCC's Chief Administrative Law Judge, who presided over the case, refused to enlarge the issues to inquire whether WCM had been guilty of misrepresentation, concluding that the Commission had "made a reasoned decision not to include a misrepresentation issue" in issuing its designation order in this case. *Memorandum Opinion and Order*, FCC 77M-1128, released June 24, 1977. After hearings in this case, the ALJ issued his *Initial Decision*, finding that WCM had failed to meet its 1971 program promises. Nonetheless, the ALJ granted KDIG's renewal for a short term,[4] based

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[3] In Commission parlance, this is a "promise-versus-performance" case. "Promise-versus-performance" is a Commission-created term which refers to those cases in which it is charged that the licensee failed to broadcast the non-entertainment programming which it proposed at the beginning of its license term. *See, e.g., Rust Craft Broadcasting of New York, Inc.*, 54 FCC 2d 1222, 1230 (1975).

[4] A short-term renewal grant is an administrative sanction which renews a station's license for a period less than the statutory term. It is used, as the ALJ noted here, "in order that the Commission may review the station's performance promptly and take such actions as circumstances may dictate." *Initial Decision*, ¶ 68. The short term renewal has often been imposed in promise-versus-

on his conclusions that WCM's errors resulted from inexperience and, therefore, that "in this instance, the past is [not] a reliable guide to the future." *Initial Decision*, ¶ 66.

On August 25, 1980, the Commission reversed its Chief Administrative Law Judge and denied renewal of KDIG's license. Noting that its review of programming performance in promise-versus-performance cases is confined "to a determination of whether the licensee made reasonable and good faith efforts to effectuate its proposal,"[5] the Commission concluded that WCM's efforts had not met that standard.[6] Not content to end its inquiry there, however, the Commission also found that WCM made its 1971 program proposals with no intent of carrying them out,[7] in effect finding that WCM had misrepresented to the Commission in making those proposals. Moreover, while affirming the ALJ's decision not to enlarge the issues to add a misrepresentation issue,[8] the Commission noted paradoxically that "[a]ppropriate findings and conclusions

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performance cases to permit an early review of a licensee's post-term non-entertainment programming. *See, e.g., WSER, Inc.*, 29 FCC 2d 441 (1971); *KORD, Inc.*, 31 FCC 85 (1961).

[5] *Decision*, ¶ 15.

[6] While acknowledging that WCM had suffered severe financial problems, the Commission declined to excuse KDIG's programming shortfall on that ground, alleging that WCM had failed to make a "station-specific" showing of financial distress for KDIG. Essentially, the Commission found that WCM had made a "stepchild" out of KDIG, depriving it of facilities and resources, and disproportionately allocating its available resources to a commonly-owned station. *Decision*, ¶¶ 31-33 & n.39.

[7] The Commission found that "the licensee made initial [program] proposals to the Commission which it did not then intend to effect," and that WCM principal Donald B. McCann "did not intend to fulfill the [1971] programming promises when they were made." *Decision*, ¶¶ 33,36.

[8] *Decision*, ¶ 39.

relating to licensee candor could and should have been made with regard to evidence which surfaced in the hearing processes" respecting the June 1974 program logs submitted by WCM as part of its 1974 renewal application. *Decision*, ¶ 40.

Finally, the Commission rejected the ALJ's reasoning in ordering a short-term renewal grant. It dismissed as a "generalized personal assessment, . . . not material to the . . . promise versus performance issue" the ALJ's conclusion that WCM's principals are "honorable men," whose past failings had resulted from inexperience and thus were not indicative of WCM's future performance.[9] The Commission denied KDIG's renewal, citing as justification only two cases—*WMOZ, Inc.*, 36 FCC 202 (1964) and *Leflore Broadcasting Co., Inc.*, 65 FCC 2d 556 (1977), *affirmed sub nom, Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980)[10]—both of which involved licensee misrepresentation. Neither in its *Decision* nor on reconsideration did the Commission explain its divergence from all precedent in promise-versus-performance cases in denying KDIG's renewal.

On appeal of the Commission's denial of its license renewal to the United States Court of Appeals for the District of Columbia Circuit,[11] WCM argued, *inter alia*, that the Commission had: (1) violated due process by making findings that WCM had misrepresented without giving WCM notice and an opportunity to respond to those charges; (2) imposed its harshest sanction without furnishing the compelling justification required by *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *affirmed*, 450 U.S.

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[9] *Decision*, ¶ 35.

[10] *Decision*, ¶ 36.

[11] The Court of Appeals' jurisdiction was invoked under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b).

91 (1981), *rehearing denied*, 451 U.S. 933 (1981);[12] and (3) failed to explain its departure from consistent precedent in promise-versus-performance cases.

In a brief and cryptic opinion, the Court of Appeals rejected these arguments. While acknowledging that the Commission's findings regarding WCM's intent were "imprudent" and "should not [have been] discussed by the Commission in the absence of a designated misrepresentation issue," the Court held that no due process violation had occurred because WCM had not been "harmed by lack of notice."[13] Further, while conceding that "[t]his case is apparently the first time a license renewal has been denied solely because of a promise-versus-performance failure," the Court held that the Commission was not required to meet the *Steadman* requirement to furnish compelling justification for its use of its most severe sanction "because of differences in the regulatory schemes at issue." 695 F.2d at 621-22.[14] Finally, the Court held that the FCC was not required to explain its deviation from past precedent in denying KDIG's renewal because of its broad discretion in fashioning sanctions.

WCM timely petitioned for rehearing of the Court of Appeals' decision. Rehearing was denied on February 7, 1983, and this petition for certiorari followed.

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[12] *Steadman* requires an agency imposing similarly severe sanctions upon an applicant or licensee to explain why a lesser sanction would not suffice to serve the agency's statutory goals. *See* text at notes 24-29 *infra*.

[13] The Court also noted that the Commission had denied, in its *Reconsideration Decision*, that it had made findings of misrepresentation. 695 F.2d at 619-20.

[14] *Steadman* involved the debarment by the Securities and Exchange Commission ("SEC") of an investment adviser.

REASONS FOR GRANTING THE WRIT

I. The Court's Decision Creates Uncertainty as to an Agency's Explanatory Burden When It Deviates From Its Prior Precedent In Imposing a Sanction, an Important Question Which Should be Settled by This Court.

This case represents a watershed in FCC history. Ever-sensitive to the First Amendment concerns which inhere in the subject matter it regulates,[15] the FCC has never before denied license renewal for programming failures alone. Indeed, the Commission has here departed from over twenty years of consistent precedent in promise-versus-performance cases, in which, absent accompanying affirmative licensee malfeasance, prospective sanctions have always been employed.[16] The Court of Appeals itself acknowledged that this "is apparently the first time a [Federal Communications Commission] license

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[15] As the Commission itself noted in its Brief to the Court, pp. 6-7, in *Committee for Community Access, et al. v. FCC*, Case Nos. 82-2314, 82-2373, 82-2400 (D.C. Circuit):

> First Amendment and other policy considerations favor giving deference to a broadcaster's discretion in the sensitive area of programming, and have led [the D.C. Circuit] to remind the Commission that it must walk a 'tight rope between saying too much and saying too little' and 'avoid pervasive supervision' of programming content. *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[16] *See, e.g., Federal Broadcasting System*, 75 FCC 2d 615 (1980) (renewal granted to permit distress sale); *Associated Communications Corp.*, 71 FCC 2d 1353 (1979) (renewal granted; reporting conditions imposed); *Hubbard Broadcasting, Inc.*, 41 Rad. Reg. 2d (P&F) 979 (1977) (short-term renewal grant); *Rust Craft Broadcasting of New York, Inc.*, 54 FCC 2d 1222 (1975) (short-term renewal granted); *Palmetto Radio Corp.*, 58 FCC 2d 1104 (1976) (renewal granted); *WSER, Inc.*, 29 FCC 2d 441 (1971) (short-term renewal granted); *Loudon County Broadcasting Co.*, 4 FCC 2d 188, *recon. denied*, 5 FCC 2d 13 (1966); *KORD, Inc.*, 31 FCC 85 (1961) (short-term renewal granted).

renewal has been denied solely because of a promise-versus-performance failure." [17]

It is well-settled that an agency has broad discretion in imposing a sanction and is not required "to deal with all cases at all times as it has dealt with some that seem comparable." *FCC v. WOKO, Inc.*, 329 U.S. 223, 228 (1946). *Accord, Butz v. Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187 (1973). Yet, it is also beyond dispute that an agency *must explain* any such deviation from prior precedent in order to facilitate judicial review of its decision.[18] Thus, where the agency departs from its prior precedent, the court must be satisfied *"that the agency was aware it was changing its views and has articulated permissible reasons for that change*, and also that the new position is consistent with the law." *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982) (emphasis

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[17] 695 F.2d at 621.

[18] *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973); *Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53 (1954); *Hatch v. FERC*, 654 F.2d 825, 833-35 (D.C. Cir. 1981); *Doubleday Broadcasting Company, Inc. v. FCC*, 655 F.2d 417, 423 (D.C. Cir. 1981); *Communications Investment Corp. v. FCC*, 641 F.2d 954, 976-77 (D.C. Cir. 1981); *White Mountain Broadcasting Co., Inc. v. FCC*, 598 F.2d 274, 278-79 (D.C. Cir.), *cert. denied*, 444 U.S. 963 (1979) (explanation not required only when reason for departure is so obvious as to remove the need for explanation); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) ("[t]his Court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975); *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026-27 (D.C. Cir. 1971); FTC v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970); *Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Herbert Harvey, Inc. v. NLRB*, 385 F.2d 684 (D.C. Cir. 1967); *Burinskas v. NLRB*, 357 F.2d 822, 827 & n.5 (D.C. Cir. 1966); *City of Lawrence v. CAB*, 343 F.2d 583, 588-89 (1st Cir. 1965); *see Public Media Center v. FCC*, 587 F.2d 1322, 1331-32 (D.C. Cir. 1978); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965).

added). *Accord, Columbia Broadcasting System, Inc. v.* FCC, 454 F.2d 1018, 1026-27 (D.C. Cir. 1971).

The Commission's *Decision* did not discuss, acknowledge, or, indeed, show any awareness of, the unprecedented nature of its action. Nowhere in the *Decision* is there any explanation for the departure from twenty years of consistent treatment of promise-versus-performance cases. The subject is not addressed even on reconsideration, after WCM had pointed out to the Commission the unprecedented nature of its action.[19]

The Court of Appeals admitted that this case involved the application of an unprecedented sanction,[20] and paid brief obeisance to the principle that an agency must acknowledge and explain its deviation from past precedent.[21] However, in affirming the FCC's denial of KDIG's renewal, the Court *totally ignored* the FCC's failure to explain its departure from precedent in imposing that sanction here, emphasizing instead the FCC's broad discretion to choose appropriate sanctions. 695 F.2d at 622, *citing FCC v. WOKO, Inc.*, 329 U.S. 223, 228-29 (1946); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965), *cert. denied sub. nom. WWIZ, Inc. v. FCC*, 383 U.S. 967 (1966).

The FCC's discretion to select the sanction it imposed here has never been challenged by WCM, and it is simply not in issue. It is only the agency's failure to *explain* its decision to reject reasoning which it had followed consistently for twenty years which necessitates this Court's

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[19] *See* Petition for Reconsideration of West Coast Media, Inc., p. 21. In fact, on reconsideration the Commission expressly declined to explain its departure from prior precedent, resting simply on its "broad discretion" to select sanctions in renewal proceedings. *Reconsideration Decision*, ¶ 12.

[20] 695 F.2d at 621.

[21] 695 F.2d at 620-21.

review.[22] In the absence of such an explanation, an applicant cannot proceed before an agency in the informed and rational manner which we demand as minimal administrative due process. *See, McHenry v. Bond*, 668 F.2d 1185, 1192 (11th Cir. 1982); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978). Moreover, no reviewing court can be satisfied that the agency did not act arbitrarily or discriminatorily. And most seriously, failure to require an agency explanation here would result in unfettered and unjustified agency action. Courts have always required more:

> expert discretion is secured, not crippled, by the requirements for . . . reasoned analysis. Expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to 'become a monster which rules with no practical limits on its discretion.'[23]

II. An Agency May Not Impose Its Most Severe Sanction Without Explaining Why A Lesser Sanction Would Not Suffice.

In *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *affirmed on other grounds*, 450 U.S. 91 (1981), the Fifth Circuit Court of Appeals held that the Securities and Exchange Commission could not impose its most severe sanction—permanent debarment—without furnishing compelling justification and explaining why a lesser sanction would not suffice. The Commission's imposition here of its ultimate sanction triggered a duty to furnish the explanation required by *Steadman*.[24] The Commission

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[22] The FCC's discretion in dealing with licensees "does not eliminate [its] burden to express clearly the basis of its action." *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 463 (D.C. Cir. 1980).

[23] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *quoting, Burlington Truck Lines v. United States*, 371 U.S. 156, 157 (1962).

[24] In addition, compelling justification was required in this case because the Commission's unprecedented action denying WCM's

plainly failed to explain why a lesser sanction would not suffice, but the Court excused this omission, holding that *Steadman* does not apply to the FCC "because of differences in the regulatory schemes at issue." Unlike the SEC, which debars a respondent as a punitive measure, the Court reasoned, the "FCC is required to make an affirmative finding that the public interest will be served by granting the license." 695 F.2d at 622.

The Court of Appeals' attempt to confine *Steadman* to the statutes administered by the SEC is untenable. The SEC and the FCC operate under similar statutory mandates. Both agencies must consider the public interest in granting or denying licenses.[25] Moreover, the SEC does not revoke a license as a punitive measure but rather only on a finding that the public interest will be served

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renewal of license on programming grounds alone raises serious First Amendment concerns:

> When the right to continue to operate a lucrative broadcast facility turns on periodic government approval of the *type* of broadcasting done, the right of the media to be free from government control over the content of speech is in constant jeopardy. (Emphasis in original.)

Leflore Broadcasting Co., Inc. v. FCC, 636 F.2d 454, 457 (D.C. Cir. 1980).

[25] The FCC must consider the public interest before granting a license. See Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a). Similarly, the SEC must consider the public interest before it can initially register investment advisors and broker-dealers. To be licensed, both investment advisors and broker-dealers must complete an application for registration containing such information as the SEC finds necessary or appropriate in the public interest. The SEC must grant registration if it finds that the requirements of the section on registration have been complied with and must deny registration if it cannot make such a finding or if it finds that the public interest would require revocation or suspension of the permitted registration. *See* Sections 203(c) and (e) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-3(c) and (e); Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b).

thereby.[26] Indeed, in *Steadman*, the Fifth Circuit itself noted this fact and re-emphasized both the "prophylactic purpose of the securities laws" and the SEC's duty to consider the " 'public interest' . . . in fashioning its orders. . . ." *Steadman v. SEC*, *supra*, 603 F.2d at 1142.[27]

Ultimately, however, whether or not the SEC and the FCC administer different regulatory schemes is beside the point. The *Steadman* requirement that an agency furnish compelling justification for its use of its most "potent weapon" [28] is not based on any of the regulatory statutes administered by the SEC but rather on the Court's duty, under the Administrative Procedure Act, to set aside

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[26] *See* Section 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b)(4); Section 9(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-9(b); Sections 203(e), and (f) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-3(e) and (f); *Decker v. Securities & Exchange Commission*, 631 F.2d 1380 (10th Cir. 1980); *Beck v. SEC*, 413 F.2d 832 (6th Cir. 1969), *on later appeal*, 430 F.2d 673, 674 (6th Cir. 1970); *Blaise D'Antoni & Associates, Inc. v. SEC*, 289 F.2d 276, 277 (5th Cir. 1961), *cert. denied*, 368 U.S. 899 (1961); *Shuck v. SEC*, 264 F.2d 358 (D.C. Cir. 1958); *Nassar & Co.*, CCH Federal Securities Law Reports, ¶ 81,904, p. 81,120 (SEC 1978); *Underhill Securities Corporation*, 42 SEC 689, 695 (1965). And, to the extent that there is a penal element in the SEC's revocation proceedings because the consequences to the licensee are severe, it is also clear that there is a penal element in the FCC's denial of renewal. In both cases, the agency is putting the licensee out of business. In fact, while the Court of Appeals denied that the FCC's denial of a license renewal is a penalty, in the very next breath, it referred to the denial as a "sanction to apply to licensee misconduct." 695 F.2d at 622.

[27] While this Court and the Fifth Circuit referred to the proceedings involved in *Steadman* as "disciplinary" proceedings, *Steadman v. SEC*, *supra*, 603 F.2d at 1139; *Steadman v. SEC*, *supra*, 450 U.S. at 92, it is clear that the statutes at issue in *Steadman* call for the SEC to censure, suspend or debar respondents only on a finding that the public interest will be served thereby, not as a punitive measure. *See* note 26 *supra*.

[28] *Steadman v. SEC*, *supra*, 603 F.2d at 1139.

agency action found to be arbitrary or capricious. As the *Steadman* Court noted:

> We are empowered to set aside Commission orders that are arbitrary and capricious. 5 U.S.C. § 551, 702, 706 (1976). We subscribe to the common-sense notion that the greater the sanction the Commission decides to impose, the greater is its burden of justification.

Steadman v. SEC, supra, 603 F.2d at 1139. Since the same standard of judicial review under the Administrative Procedure Act was applied both to the FCC order at issue in this proceeding and to the SEC order involved in *Steadman*, the explanatory burden imposed by *Steadman* clearly applied to the FCC's action in this case.

The Court of Appeals' refusal to apply *Steadman* to the FCC is a serious error. As noted above, courts require agency explanations to guard against arbitrary and irrational decision-making. When an agency, whether it be the SEC, the FCC, or some other federal agency, imposes its most severe sanction on a respondent, the courts must be especially vigilant to insure that the agency decision is the product of reasoned decision-making, for the stakes are high.[29] The FCC, no less than the SEC, must meet this higher explanatory burden.

III. The FCC's Wide Departure From Standards of Due Process, Sanctioned by the Court of Appeals, Requires an Exercise of this Court's Power Of Supervision.

As the Court of Appeals acknowledged, "The Communications Act [Section 309(e)], the Administrative Procedure Act [Section 554(3)(b)] and the due process clause require the FCC to designate the issues to be

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[29] The sanction here has drastic consequences. It puts a broadcaster out of business.

considered in a renewal hearing." 695 F.2d at 619.[30] The agency is required to designate the issues in order to provide the licensee fair notice of the charges brought against it and an opportunity to respond to those charges. *Id.* In this case, the FCC utterly betrayed its obligation to afford WCM due process by making key findings of misrepresentation without first designating a misrepresentation issue.

Clearly, the Commission's findings went beyond those encompassed by the promise-versus-performance issue. Under a promise-versus-performance issue, the Commission examines the *bona fides* and reasonableness of a licensee's efforts to carry out its programming promises. *See KORD, Inc.*, 31 FCC 85 (1961). The promise-versus-performance issue designated in this case should have focused on "whether West Coast Media, Inc. made reasonable and good faith efforts to carry out its non-entertainment programming proposal. . . ." 61 FCC 2d 577, 585 (1976). Instead of examining WCM's programming performance, however, the FCC focused on its motives and intent.

The Commission found that WCM had made its programming promises to the Commission with no intent to keep them. *Decision*, ¶¶ 19, 23, 33, 35 n.45, 36. This is clearly a finding of misrepresentation, not of promise-versus-performance failure: finding that a licensee "*never intended* to fulfill [its] programming promises necessarily entails the corollary finding that [it]

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[30] *See Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *RKO General, Inc. v. FCC*, 670 F.2d 215, 224-25, 235-37 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982), 102 S.Ct. 2931 (1982); *Bendix Corporation v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971); *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 861-62 (2nd Cir. 1966); *NLRB v. Tennsco Corp.*, 339 F.2d 396, 399-400 (6th Cir. 1964).

intended to deceive the Commission,"[31] and intent to deceive the Commission in making a representation is "a *sine qua non* of a misrepresentation issue." *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980), *quoting CBS, Inc.*, 49 FCC 2d 1214, 1223 (1974). Moreover, the Commission made findings of misrepresentation with respect to the 1974 KDIG renewal application. The ALJ found the application to be "inherently misleading," *Initial Decision*, ¶ 50, and the Commission concluded that "[a]ppropriate findings and conclusions relating to licensee candor could and should have been made" regarding that application. *Decision*, ¶ 40. Most significantly, the Commission made these findings of misrepresentation without affording WCM any opportunity to present evidence that it had not misrepresented.

The Court of Appeals acknowledged that the Commission's findings concerning WCM's state of mind in making its programming proposals were "imprudent," noting that "[s]uch intentions should not be discussed by the Commission in the absence of a designated misrepresentation issue," because a licensee's "intention not to meet [its programming proposals] closely resembles an intent to deceive the FCC, which is at the heart of misrepresentation cases." 695 F.2d at 620. Nonetheless, the Court refused to remand the case to the FCC because it held that WCM had neither been deprived of notice nor harmed by the lack of notice. With due respect to the Court of Appeals, this conclusion is flabbergasting. Findings of misrepresentation permeated the *Decision*, appearing there *six times*.[32] Clearly, the result in this

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[31] (Emphasis in original) *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980).

[32] *See Decision*, ¶¶ 19, 23, 33, 35 n.45, 36, 40. In the face of these repeated findings, the Commission's conclusory denial, on reconsideration, that it had made findings of misrepresentation, a denial relied on by the Court of Appeals in rejecting WCM's claim of a due process violation, 695 F.2d at 620, merits no credence.

case is inextricably linked to these impermissible findings. In justifying its decision to deny renewal in this case, the Commission cited just two cases: *both were misrepresentation cases.*[33] Moreover, while broadcast licenses have *never before* been denied solely for a promise-versus-performance failure,[34] they have consistently been denied for licensee misrepresentation.[35]

WCM never had notice or an opportunity to address the questions raised concerning its intent at the time it made its 1971 program proposals or at the time it submitted its 1974 renewal application.[36] And that deprivation is at the heart of this due process violation,

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[33] *See Decision*, ¶ 36, *citing WMOZ, Inc.*, 36 FCC 202 (1964), and *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980).

[34] *See* n.16 *supra*.

[35] *See*, e.g., *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Sea Island Broadcasting Corp. of S.C. v. FCC*, 60 FCC 2d 146 (1976), *recon. denied*, 64 FCC 2d 721 (1977), *aff'd*, 627 F.2d 240 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980); *Leflore Broadcasting Co., Inc. v. FCC*, 65 FCC 2d 556 (1977), *aff'd*, 636 F.2d 454 (D.C. Cir. 1980); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580 (D.C. Cir.), *cert. denied*, 403 U.S. 905 (1971); *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099 (1978); *WPRY Radio Broadcasters, Inc.*, 40 FCC 2d 1183 (1973); *Radio Broadcasters, Inc.*, 23 FCC 2d 209, *recon. denied*, 25 FCC 2d 450 (1970); *Vinita Broadcasting Co., Inc.*, 30 FCC 2d 458, *recon. denied*, 32 FCC 2d 501 (1971); *WMOZ, Inc.*, 36 FCC 202, *recon. denied*, 36 FCC 1467 (1964), *rev'd and remanded*, 344 F.2d 197 (D.C. Cir. 1965), *aff'd in part*, 3 FCC 2d 637 (1966).

[36] Notice to WCM that the proceeding would focus on its efforts to meet its proposals *after they had been made* in no way constituted notice that its state of mind *at the time it made those proposals* was also at issue. The two issues are clearly different in scope and focus, concerning themselves with two different and discrete time periods. Moreover, the promise-versus-performance issue designated did not afford notice to WCM that its intent in submitting its 1974 renewal application was at issue.

regardless whether or not the result in the case was altered thereby:

> The evil at which the statute [the Administrative Procedure Act, Section 554(b)] strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied.

Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1257 (D.C. Cir. 1968).

Ultimately, there is only one rational explanation for what happened in this case. Though designated as a promise-versus-performance case which would have led, under appropriate FCC precedent, to license renewal with prospective sanctions, the FCC became concerned that misrepresentations had occurred. Without changing the issues in the proceeding, it made misrepresentation findings throughout its *Decision*. It then denied renewal of license, relying exclusively upon misrepresentation precedent and ignoring all prior promise-versus-performance cases.

The FCC may not be permitted to "change theories in midstream without giving respondents reasonable notice of the change . . . ." *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C.Cir. 1968). If it believed that misrepresentation occurred, it was required to designate an appropriate issue and give the licensee an opportunity to adduce evidence in its own behalf. *RKO General, Inc. v. FCC*, *supra*, 670 F.2d at 224-25, 235-37. This Court cannot sanction any lesser due process observance by administrative agencies.

IV. Summary Reversal of the Court of Appeals' Clearly Erroneous Decision Is Warranted.

The decision in this case put a broadcaster completely out of business solely because it did not present enough non-entertainment programming on its station. Although the remedy imposed was unprecedented in its harshness, the FCC did not justify its total disregard of precedent. Nor did the FCC explain why lesser sanctions would not suffice. Moreover, without designating appropriate hearing issues, the FCC found that WCM had misrepresented, findings conceded by the Court of Appeals to be "imprudent".[37] In short, the action taken here was clearly unprecedented, unexplained and effected with little regard for requisite administrative due process.

There is no need for this Court to belabor the factual record in this case. The decision of the Court of Appeals affirming the Commission's action in this case was so fraught with procedural error that summary reversal is warranted.[38] *Atchison, Topeka & Santa Fe Railway Co. v. Board of Trade*, 412 U.S. 800 (1973); *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *affirmed on other grounds*, 450 U.S. 91 (1981); *Morgan v. United States*, 304 U.S. 1, 18-19 (1938).

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[37] Indeed, the injustice is magnified since the Commission made these findings after affirmatively assuring WCM that misrepresentation was *not* at issue. *Memorandum Opinion and Order*, FCC 77M-1128, June 24, 1977.

[38] When confronted with clearly erroneous action below, this Court may summarily reverse to conserve its time and resources. *See* Rule 23 of the Rules of the Supreme Court; *Robert L. Stern and Eugene Gressman, Supreme Court Practice*, p. 362 (5th ed., C.1978). The Court has adopted this procedure frequently. *See, e.g., Johnson v. Virginia*, 373 U.S. 61 (1963); *Rogers v. Calumet National Bank*, 358 U.S. 331 (1959); *Matles v. United States*, 356 U.S. 256 (1958); *Edwards v. United States*, 355 U.S. 36 (1957); *Securities & Exchange Commission v. Otis & Co.*, 338 U.S. 843 (1949).

CONCLUSION

Petitioner is the first broadcaster ever to lose its license for mere promise-versus-performance shortfalls. Yet, the FCC failed to explain why it departed from its previous precedent in imposing the sanction in this case, or why a lesser sanction would not suffice. Moreover, the Commission's decision was permeated with impermissible findings of misrepresentation, made despite the absence of an appropriate issue at hearing. Despite these serious flaws in the Commission's decision, the Court of Appeals affirmed. If its decision is permitted to stand, it will afford the FCC unfettered discretion to impose sanctions without adequate explanation and to broaden evidentiary hearings to cover potentially decisive issues without adequate notice.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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